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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3233 of 1998

with

Civil Application No. 5985 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? Yes.
3. Whether Their Lordships wish to see the fair copy of the judgement? No.
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.
5. Whether it is to be circulated to the Civil Judge? No.

RAMESHBHAI SHANTILAL HARIJAN

Versus

COMMISSIONER OF LABOUR

Appearance:

MR DS VASAVADA for Petitioners

Mr.V.B.Gerania AGP for Respondent No. 1

MR N.V.Anjaria for DS NANAVATI for Respondent No. 2

NOTICE SERVED BY DS for Respondent No. 3

CIVIL APPLICATION No 5985 of 1998

in

SPECIAL CIVIL APPLICATION NO 3233 of 1998

PR MEHTA

Versus

RAMESHBHAI SHANTILAL HARIJAN

Appearance:

MR GM JOSHI for Petitioner

MR DS VASAVADA for Respondent No. 1

Coram: S.D.Pandit.J

Dated: 01.07.1998

ORAL JUDGEMENT

Rule. Mr. V.B.Gerania, A.G.P. for respondent no.1, Mr. N.V.Anjaria for respondent 2 and Mr. G.M.Joshi for respondent no.3 learned advocates waive service of Rule on behalf of respective respondents.

2. The 12 petitioners-workmen are working in the township belonging to respondent no.2. In the said town ship respondent no.2 is running 3 schools, a club for the recreation of its employees and is having about 3000 houses. The petitioners are engaged for lifting the garbage of this township and putting the same in the trucks so as to remove the same out of the township. It is the case of the petitioners that they are shown on paper to be the workmen engaged through the Labour contractor-respondent no.3. According to them said contract is not genuine and correct and that they want the abolition of the said contract. They accordingly filed a complaint through Bharatiya Mazdoor Sabha-the union of the workman on 9.6.1997 before the respondent no.3 requesting him to make a reference to the State Labour Advisory Board as well as the Industrial Tribunal, but no action on the same has been taken. Again reminders were sent on 11.9.97 and 16.1.98. But neither the reminders are replied nor any action is taken by the respondent no.3. Therefore, they have come before this court and they are seeking the following reliefs as per para no.17 of the petition.

"(a) to please allow this petition with costs by issuing a writ of mandamus or any other appropriate writ to the Respondents under Article 226 of the Constitution of India;

(b) to please hold that the action of the Respondents in not taking any appropriate decision or in not taking any action against the

complaint made by the Union of the petitioners is illegal, arbitrary and violative of Article 14 of the Constitution;

- (c) to please further direct the Respondent no.1 to take appropriate decision and communicate to the same to the petitioners within one month from the date of the receipts of the order from this Honourable High Court;
- (d) to please further direct the Respondent no.2 to absorb the petitioners as permanent workmen and to pay them the wages which are being paid to the permanent workmen;
- (e) pending hearing and final disposal of the present petition, the Respondent Nos. 2 and 3 may be restrained from terminating the services of the petitioners even if the appropriate decision is taken by the Respondent no.1, the services may not be terminated for period of two months thereafter in order to enable the Petitioners to obtain appropriate orders;
- (f) pending hearing and final disposal of the present petition, the Respondent no.2 may be directed to utilise and engage the services of the Petitioners if they engage the new contractor after 1st May 1998;
- (g) to grant such other and further relief/s that may be deemed just and proper by the Honourable Court to the Petitioners in the overall facts and circumstances of the case."

3. Respondent no.2 has contested the claim of the petitioners by filing affidavit in reply. Respondent no.2 contended that the interim relief which this court has granted ought not to have been granted. They further contended that the settlement under section 12(3) read with section 18(3) of Industrial Disputes Act 1947 was entered into between respondent no.2 corporation and the contractors and four trade unions representing the contract laborers and present respondent no.3 was one of the contractors to the said settlement. As per the said settlement, the corporation-respondent no.2 had agreed to absorb 1604 laborers from January 1996 to 2000 in a phased manner. Therefore, in view of the said settlement, present petition is not tenable. It is further contended that the claim of the petitioner that the contract is a sham and camouflage is not correct. It

is further contended that the contract between respondent no.2 and 3 for 1997-98 , admittedly, has come to an end on 30.6.98. It is contended by the respondent no.2 that the petitioners are the employees of the contractor-respondent no.3 and not of the respondent no.2 Indian Petro Chemical Corporation and consequently they are not entitled to get any relief against the respondent no.2. Thus it is contended by respondent no.2 that present petition is not tenable and that the same should be dismissed.

4. The respondent no.3 has filed Civil Application No. 5985 of 1998. It is the contention of respondent no.3 that all the petitioners are his employees. Respondent no.3 further claimed in this application that out of the said petitioners, persons named at sr.nos. 3 to 12 of Civil Application No. 5985 of 1998 are working under the contract which has come to an end on 30.6.1998. He has stated that in view of the said contract coming to an end on 30.6.98, it is not possible for him to continue the same and he cannot continue the opponents nos 3 to 12 to carry out the same work with respondent no.2. It is claimed that opponents nos 1 and 2 in this Civil Application are working with the respondent no.2 but under a different contractor and they are continued to work with them. The applicant of this Civil Application want to engage opponents nos 3 to 12 with another contractor within the same township and to carry out another work as daily wagers. Mr. Anjaria learned advocate appearing for respondent no.2 has submitted before me that even after respondent no.3 takes away respondents nos 3 to 12, the respondent no.2 will not give the contract work in question which is carried out by the applicant in Civil Application to any other contractor and the said work will be carried out by the workmen or employees of respondent no.2 who are already in service.

5. Respondent no.1 has not filed any affidavit in reply to SCA No. 3233 of 1998 as well as to the Civil Application. The petitioners have raised a specific contention that the alleged contract which has entered into between respondents nos 2 and 3 for the purpose of engaging the present petitioners is sham and bogus and that it is a camouflage created in order to avoid the provisions of the Contract Labour(Regulation and Abolition) Act 1970. Now when that specific contention is raised by the petitioners, it was necessary for the respondent no.1 to take a decision regarding the claim

made by the petitioners. When the claim of the petitioners is not accepted by respondents nos 2 and 3 and when respondent no.1 is not in a position to arrive at any settlement between the parties , then it is but natural that he ought to have made a reference to the competent authority to decide the issues arising on account of said contentions raised by the present petitioners.

6. The petitioners want me to issue direction to respondent no.1 to make a reference to the Labour Court/Industrial Tribunal to decide the issues which are arising out of the contention raised by the petitioner but at the same time the petitioners also want me to continue the petitioners as the workmen of respondent no.2 and to continue their services with the respondent no.2. Admittedly there is a contract between respondent no. 2 and respondent no.3 as regards the services of the present petitioners. No doubt it is the contention of the petitioners that said contract is sham, bogus and a camouflage created to avoid the provisions of the Contract Labour(Regulation and Abolition) Act. Therefore, unless that issue is decided by the competent authority, it is not possible to hold either in favour of the petitioners or against them. Therefore, to direct the respondent no.2 to continue with the service of the present petitioners would amount to deciding the issue raised by the petitioners at this juncture. Unless it is held that the contract between the respondents nos 2 and 3 is sham and bogus and that the petitioners are working with respondent no.2, it is not possible to give any direction for the respondent no.2 to continue with the petitioners as their workmen. In the case of R.K.Pande vs. Steel Authority of India 1994 (5) SCC 304 in para(7), the Apex Court has observed as under:

"It is true that with the passage of time and purely with a view to safeguard the interests of workers, many principal employers while renewing the contracts have been insisting that the contractor or the new contractor retains the old employees. In fact such a condition is incorporated in the contract itself. However, such clause in the contract which is benevolently inserted in the contract to protect the continuance of the source of livelihood of the contract labour cannot by itself give rise to a right to regularisation in the employment of the principal employer. Whether the contract labourers have become the employees of the principal employer in course of time and whether

the engagement and employment of labourers through a contractor is a mere camouflage and a smokescreen, as has been urged in this case, is a question of fact and has to be established by the contract labourers on the basis of the requisite material. It is not possible for the High Court or this Court, while exercising writ jurisdiction or jurisdiction under Article 136 to decide such questions, only on the basis of affidavits. It need not be pointed out that in all such cases, the labourers are initially employed and engaged by the contractors. As such at what point of time a direct link is established between the contract labourers and the principal employer, eliminating the contractor from the scene, is a matter which has to be established on material produced before the court. Normally, the Labour Court and the Industrial Tribunal, under the Industrial Disputes Act are the competent fora to adjudicate such disputes on the basis of the oral and documentary evidence produced before them"

In my opinion, the above observations of the Supreme Court are applicable to the case before me. Therefore, at this stage, it is not possible to pass an order directing the respondent no.2 to continue with the present petitioners as his workmen. In case, if ultimately it is found that the contract between the respondents nos 2 and 3 was sham and bogus, then naturally, the necessary consequence will follow by passing an order of reinstatement of present petitioner if their services are either terminated or discontinued.

6. No doubt the respondent no.3 has come forward before this court that he will continue to supply work to the present petitioners elsewhere in view of the terms of the contract, the contract has come to an end on 30.6.98. Therefore, merely because the respondent no.3 continues the services of the present petitioners in any other branch or section will not make the claim made by the petitioners for the purpose of raising the industrial dispute bad in law or they will not be deprived of getting the fruits of the said industrial disputes. As the respondent no.3 is continuing to give job to the present petitioners, within the same area though of a different nature in order to see that present petitioners should not be ultimately thrown out of job. Therefore, I will only order and direct the respondent no.3 that in

case if the respondent no.3 is likely to discontinue their services then he should give at least one months notice to the present petitioners so that they can have recourse to legal proceedings. Similarly respondents nos 2 and 3 in case of discontinuing with the services of respondents nos 1 and 2 in the Civil Application, they should be given atleast one month's notice to respondents nos 1 and 2 before actual termination of the services so that respondents nos 1 and 2 in the C.A can have recourse to law.

7. Therefore, in view of the above discussion I direct that the respondent no.1 in the SCA should take a decision on the complaint lodged by the present petitioners which will require the respondent no.1 to consider the question of making a reference to the competent authority on the following issues.

- (a) Whether the contract between the respondents nos 2 and 3 as regards the engagement of the petitioners is sham and bogus contract entered into as a camouflage to avoid the provisions of Contract Labour(Regulation and Abolition) Act 1970 ?
- (b) Whether the petitioners are the employees of Respondent no.2 and their services are to be regularised ?

Respondent no.1 should give the said decision within one month from today. Learned advocate for the respondent no.3 has made a statement that the petitioners who are opponents in CA No.5985/98 at sr.nos. 3 to 12 will be continued in job on the same wages and service conditions. Rule made absolute. C.A.stands disposed of. No order as to costs.

Direct Service.

(S.D.Pandit.J)